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# Immunity for Child Sex Trafficking Extended to Backpage.com: Doe ex rel. Roe v. Backpage.com, LLC

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Immunity for Child  
Sex Trafficking Extended to Backpage.com:  
*Doe ex rel. Roe v. Backpage.com, LLC*

*Steven B. Taylor\**

“In this litigation, two important public policies collide head on—the suppression of child sex trafficking and the promotion of a free and open Internet.”<sup>1</sup> Plaintiffs allege that they were molested and repeatedly raped after being advertised as sexual wares by their “pimps” on Defendants’ website, Backpage.com (Backpage).<sup>2</sup> One of the plaintiffs was a fifteen-year-old runaway who alleges that her advertised “services” resulted in ten to twelve sex “transactions” each and every day.<sup>3</sup> She was raped more than 1,000 times through the use of Backpage.<sup>4</sup> The other plaintiffs have similar stories.<sup>5</sup> Backpage contends, and the District Court of Massachusetts agrees, that most of the Doe plaintiffs’ claims are preempted by the Communications Decency Act (CDA).<sup>6</sup>

In their Second Amended Complaint, Plaintiffs allege that Defendants’ business practices violate both the Trafficking Victims Protection Reauthorization Act of 2008 (TVPPRA) and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), and also constitute unfair and deceptive business practices under the Massachusetts Consumer Protection Act.<sup>7</sup> Defendants moved to dismiss the Second Amended Complaint for failure to state a claim.<sup>8</sup> The case was dismissed, and an appeal to the First Circuit is now pending.<sup>9</sup>

To support the motion to dismiss, Backpage relied primarily on the immunity provided by 47 U.S.C. § 230. Immunity results from the requirement that “[n]o provider or user of an *interactive computer service* shall be treated as the publisher or speaker of any information provided by another *informa-*

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1. *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 151 (D. Mass. 2015).

2. *Id.*

3. *Id.* at 153.

4. *Id.*

5. *See id.*

6. *Id.* at 151; *see* 47 U.S.C. § 230 (2012).

7. *Backpage.com*, 104 F. Supp. 3d at 154; *see* 18 U.S.C. § 1595 (2015); Mass. Gen. Laws ch. 265, § 50 (2012); Mass. Gen. Laws ch. 93A, § 9 (2004).

8. *Backpage.com*, 104 F. Supp. 3d at 154; *see* Fed. R. Civ. P. 12(b)(6).

9. *Backpage.com*, 104 F. Supp. 3d at 165.

tion content provider,”<sup>10</sup> and the concomitant preemption of “cause[s] of action . . . brought . . . under any State or local law that is inconsistent with this section.”<sup>11</sup> The local government amici curiae argue, however, that Backpage is also an “information content provider,” an entity that § 230 defines as “any person or entity that is responsible, in whole or in part, for the creation or *development* of information provided through the Internet or any other interactive computer service.”<sup>12</sup> Thus, whether alleged child sex trafficking victims may have their day in court turns on whether Backpage, clearly an interactive computer service (ICS), is also an information content provider. For reasons set forth below, the court erred in failing to recognize Backpage as an information content provider.

### I. THE COMMUNICATIONS DECENCY ACT OF 1996

The immunity provision of the Communications Decency Act was prompted by a state court case holding Prodigy, an online service provider, responsible for defamatory messages posted on its message board.<sup>13</sup> By removing some messages, Prodigy became legally responsible for messages it failed to remove.<sup>14</sup> The court reasoned that self-policing made Prodigy like a newspaper publisher and thus held it responsible for the publication of the defamatory remarks of another.<sup>15</sup> In a similar case, CompuServe, another service provider, was held not responsible for the remarks of another because it had no opportunity to review the contents of a publication before it was posted on their service.<sup>16</sup> Accordingly, the two rulings created the unpalatable result where an ICS attempting to police postings faced liability while another ICS making no attempt to filter problematic posts escaped all liability.<sup>17</sup> Naturally, after the rulings, no online service provider would attempt to filter any messages, no matter how harmful.<sup>18</sup> To correct this faulty result, Congress added § 230, which provides “[p]rotection for ‘Good Samaritan’ blocking and screening of offensive material.”<sup>19</sup> Ironically, the District Court

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10. 47 U.S.C. § 230(c)(1) (2012) (emphasis added).

11. § 230(e)(3).

12. § 230(f)(3); *Backpage.com*, 104 F. Supp. 3d at 156 (emphasis added).

13. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

14. *Id.*

15. *Id.*

16. *Id.* (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)).

17. *Id.*

18. *Id.*

19. 47 U.S.C. § 230(c) (2012); *Roommates.com*, 521 F.3d at 1163.

of Massachusetts construes the provision to provide immunity even to the malicious “Samaritan.”

## II. APPLYING THE IMMUNITY PROVISION OF 47 U.S.C. § 230

In *Doe ex rel. Roe v. Backpage.com, LLC*, the court was presented with the question of whether § 230 of the Communications Decency Act provides immunity to the owners of Backpage from allegedly advertising, as sexual wares, underage children who were “molested and repeatedly raped” as a result of the advertisements.<sup>20</sup>

### A. Factual and Procedural History

“Backpage is an online classifieds forum that groups goods and services advertised for sale by geographic location and subject matter.”<sup>21</sup> The forum provides an “adult entertainment” section with an “escorts” subsection.<sup>22</sup> The Plaintiffs allege that the subsection is notorious for illicit trafficking of children for the sex trade and that Backpage’s operation largely depends on revenues earned from this criminal usage.<sup>23</sup> Plaintiffs allege that Backpage structures the adult entertainment section to “lightly camouflage its illegal content to divert the attention of law enforcement.”<sup>24</sup> To support this assertion, Plaintiffs allege that Backpage charges a material fee for each advertisement while age verification and identity are not required.<sup>25</sup> The payment is accepted through anonymous means (*e.g.* prepaid debit cards and Bitcoin), and a poster entering an age less than eighteen will simply be prompted to re-enter another age.<sup>26</sup> Plaintiffs also allege the company removes identifying metadata associated with photographs before publishing, and that the Backpage filtering system, as a pretext, removes some words or phrases while still allowing others that imply that the escort is underage.<sup>27</sup> In sum, Plaintiffs allege that Backpage has created a “façade of concern” by engaging in a “phony war” against sex traffickers designed only to divert attention from their illegal activity.<sup>28</sup>

The three plaintiffs all make similar claims of harm due to Backpage’s business practices.<sup>29</sup> While under the age of eighteen, each minor child rou-

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20. *Doe ex rel. Roe v. Backpage.com*, 104 F. Supp. 3d 148, 151 (D. Mass. 2015).

21. *Id.*

22. *Id.*

23. *Id.* at 152.

24. *Id.*

25. *Id.*

26. *Backpage.com*, 104 F. Supp. 3d at 152.

27. *Id.*

28. *Id.*

29. *See id.* at 152–53.

tinely had their “services” advertised on Backpage by pimps.<sup>30</sup> The ads used words to signify their age like “young,” “new,” “tiny,” and “playful.”<sup>31</sup> While in the “thrall” of their pimps, Plaintiffs were bought and raped thousands of times by those responding to the hundreds of ads placed on Backpage.<sup>32</sup>

In October 2014, Plaintiffs brought suit in federal court, alleging that Backpage had, *inter alia*, violated the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA).<sup>33</sup> In January 2015, Backpage moved to dismiss the complaint for failure to state a claim.<sup>34</sup> Backpage relied primarily on the immunity provided by Congress in § 230 to have the case dismissed.<sup>35</sup>

## B. Backpage’s Argument for Immunity

Section 230 states “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”<sup>36</sup> and that such ICSs are immune from “cause[s] of action . . . brought . . . under any State or local law that is inconsistent with this section.”<sup>37</sup> Backpage contends that the Plaintiffs’ claims are preempted because Backpage had no part in creating the allegedly harmful postings.<sup>38</sup>

Amici curiae for Plaintiffs argue that Backpage is an “information content provider,” and therefore is not entitled to immunity.<sup>39</sup> Section 230(f) defines an information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>40</sup> The amici contend that Backpage provides content by: (1) “designing the escorts section of the website in such a way as to signal readers that sex with children is sold here”; (2) “coaching the crafting of ads by allowing misspell-

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30. *Id.* at 153.

31. *Id.*

32. *Backpage.com*, 104 F. Supp. 3d at 153.

33. *Id.* at 154.

34. *Id.*

35. *Id.*

36. *Id.* (quoting 47 U.S.C. § 230(c)(1) (2012)).

37. *Id.* (quoting § 230(e)(3)).

38. *Backpage.com*, 104 F. Supp. 3d at 154.

39. *Id.* at 156.

40. 47 U.S.C. § 230(f)(3) (2012).

ings of suggestive terms”; (3) “stripping metadata from posted photos”; and (4) “posting illegal materials in sponsored ads.”<sup>41</sup>

The amici argument relies heavily on *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.<sup>42</sup> In *Roommates.com*, the Ninth Circuit held that Roommates.com, while an ICS, was not immune from suit because it was also an information content provider.<sup>43</sup> The court based its decision on the fact that Roommates.com elicited information about personal characteristics of users that is forbidden by the Fair Housing Act and used that information to *develop* advertisement content.<sup>44</sup>

### C. Holding and Rationale

In this case, the District Court of Massachusetts distinguished *Roommates.com*, noting that the case attempted to draw a line between the “active control” over content exercised by Roommates.com and the “neutral interactive service” that is intended to enjoy immunity under § 230.<sup>45</sup> The court held that the practices of Backpage did not amount to affirmative participation in an illegal venture or web content creation.<sup>46</sup> In support of its finding, the court cited several distinguishing factors: (1) the escort section does not require users to offer or search for commercial sex with children; (2) the automatic categorization of ads into the “escorts” category is not content creation; (3) stripping metadata from photographs is a standard practice; and (4) accepting anonymous payment is not illegal.<sup>47</sup> In sum, the court reasoned, “Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.”<sup>48</sup>

## III. THE COURT’S ADMITTEDLY HARSH RULING WAS IN ERROR

In order to avoid misunderstanding, the court clarified that it sympathizes with the “tragic plight” described by Plaintiffs and regards the sex trafficking of children as an “abhorrent evil.”<sup>49</sup> The court further explained

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41. *Backpage.com*, 104 F. Supp. 3d at 156.

42. *Id.*; see *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

43. *Roommates.com*, 521 F.3d at 1185.

44. *Backpage.com*, 104 F. Supp. 3d at 156 (citing *Roommates.com*, 521 F.3d at 1169–70).

45. *Id.*

46. *Id.*

47. *Id.* at 157.

48. *Id.*

49. *Id.* at 165.

that it was fully aware that sex traffickers exploit the vulnerabilities of the Internet as a marketing tool.<sup>50</sup> Yet, notwithstanding this injustice, the “court has no choice but to adhere to the law that Congress has seen fit to enact.”<sup>51</sup> Of course, Congress should certainly amend the immunity provision to narrow its overly broad application. Nonetheless, there are reasonable constructions of the statute that do not result in immunity for a business that sells children for sex.<sup>52</sup>

On September 3, 2015, the Supreme Court of Washington decided *J.S. v. Village Voice Media Holdings, LLC*—a case with practically identical facts and claims.<sup>53</sup> It held that Backpage was not afforded immunity under § 230.<sup>54</sup> The court’s decision resulted from an obvious and reasonable interpretation of § 230.<sup>55</sup> The District Court of Massachusetts should have arrived at the same conclusion.

The District Court of Massachusetts erred in concluding that Backpage’s “passivity” did not “transform” it into an information content provider. First, there is no rigid dichotomy between an ICS and an information content provider; an ICS can also be an information content provider, which rightfully does not enjoy immunity for content provided.<sup>56</sup> Second, the court focused on content *creation* as the test for an information content provider; however, content *developers*, which Plaintiffs allege Backpage to be, are also content providers.<sup>57</sup> Third, one can hardly claim Backpage’s alleged actions are “passive.”

#### **A. An Interactive Computer Service Can Also Be an Information Content Provider**

Complete immunity is not granted to an ICS under § 230(c)(1).<sup>58</sup> Rather, § 230(c)(1) “simply precludes treating the user or [ICS] ‘as the publisher or speaker of any information’ if that information was ‘provided by another information content provider.’”<sup>59</sup> The statute does not shield an ICS

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50. *Backpage.com*, 104 F. Supp. 3d at 165.

51. *Id.*

52. *See J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wash. 2d 95, 98 (Wash. 2015).

53. *See id.* at 98–103.

54. *Id.* at 98.

55. *Id.* at 106 (Wiggins, J., concurring).

56. *See* 47 U.S.C. § 230(c)(1) (2012); § 230(f)(3).

57. § 230(f)(3).

58. *Vill. Voice Media Holdings*, 184 Wash. 2d at 106 (Wiggins, J., concurring).

59. *Id.* (quoting § 230(c)(1)) (Wiggins, J., concurring).

from causes of action arising out of content it provides.<sup>60</sup> Thus, while it is an ICS, Backpage does not enjoy § 230 immunity from claims arising out of information content it provides.<sup>61</sup> The court created an inappropriately heavy burden for alleged rape victims by requiring that Backpage be “transformed” from an ICS to an information content provider in order to avoid immunity. Section 230 merely requires a finding that Backpage is an information content provider, regardless of its simultaneous classification as an ICS.

## B. Providing Information Content Includes Content Development

An *information content provider* is “any person or entity that is responsible, in whole or in part, for the creation *or development* of information provided through the Internet or any other interactive computer service.”<sup>62</sup> The District Court of Massachusetts analyzed whether Backpage’s alleged activities qualify as “content creation.”<sup>63</sup> However, the court failed to determine whether the activities constitute development of information, certainly a lesser burden for Plaintiffs.<sup>64</sup>

In *Roommates.com*, the Ninth Circuit, looking at the plain ordinary meaning of the word and citing the dictionary, determined that “development” could mean “making usable or available.”<sup>65</sup> Looking to Wikipedia, the Ninth Circuit finds a “far more relevant definition” for web content development: “the process of researching, writing, gathering, organizing and editing information for publication on web sites.”<sup>66</sup> Thus, the District Court of Massachusetts erred by failing to address whether the facts pleaded constitute development of information, as considered under § 230(f)(3).

## C. The Facts Allege an Active Role in Content Development

If an ICS “passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content.”<sup>67</sup> Likewise, actively developing or creating content removes immunity from liabil-

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60. 47 U.S.C. § 230(c)(1) (2012); *Vill. Voice Media Holdings*, 184 Wash. 2d at 106 (Wiggins, J., concurring).

61. *See* § 230(c)(1).

62. § 230(f)(3).

63. *Doe ex rel. Roe v. Backpage.com*, 104 F. Supp. 3d. 149, 156 (D. Mass. 2015).

64. *See id.*

65. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 618 (2002)).

66. *Id.* (quoting *Web Content Development*, WIKIPEDIA.COM, [https://en.wikipedia.org/wiki/Web\\_content\\_development](https://en.wikipedia.org/wiki/Web_content_development) (last modified Oct. 7, 2015)).

67. *Roommates.com*, 521 F.3d at 1162.



ity for harm caused by the content.<sup>68</sup> Plaintiffs allege, among other things, that Backpage: (1) designed the escort section in such a way as to “signal” to readers that sex with children is sold on the website; (2) coached the crafting of ads; and (3) stripped metadata from photos in order to make the advertisements less traceable.<sup>69</sup> The acts alleged constitute an active role in at least development of content, which disqualifies Backpage for immunity. Further, regardless of the ruling, if Backpage has actually designed its escorts section to signal the illegal activities, that act alone constitutes the creation of actionable information. This surely removes Backpage from immunity.

#### IV. CONCLUSION

On appeal, the First Circuit should reverse the dismissal and remand the case for further proceedings. To survive a 12(b)(6) motion, well-pleaded facts, accepted as true and with all reasonable inferences drawn in Plaintiffs’ favor, must merely set forth “a plausible entitlement to relief.”<sup>70</sup> Because Plaintiffs plausibly allege that Backpage partly developed or created content that has caused them harm, 12(b)(6) dismissal should appropriately be reversed.<sup>71</sup>

Plaintiffs allege that Backpage actively created harmful information by signaling that sex with children is sold on the website.<sup>72</sup> This amounts to creation of information wholly apart from the ads that allegedly sold the underage plaintiffs for sex. Moreover, Plaintiffs allege that Backpage actively developed the harmful advertisements by coaching their design and stripping metadata from photographs.<sup>73</sup> These allegations are at least plausible, and therefore, when accepted as true, Backpage is an information content provider unprotected by the immunity provisions of § 230.<sup>74</sup> Accordingly, the First Circuit should remand the case for further proceedings to determine whether Backpage actively signaled to its users that sex with children was sold on its website and whether Backpage actively stripped metadata and coached the design of advertisements in development of the advertisement content. If Backpage is found to have created or developed content it provides, which relates to the harm alleged by Plaintiffs, then § 230 immunity should accordingly be denied.

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68. *See id.*

69. *Doe ex rel. Roe v. Backpage.com*, 104 F. Supp. 3d 149, 152 (D. Mass. 2016).

70. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007).

71. *See Iqbal*, 556 U.S. at 672; *Twombly*, 550 U.S. 559; *Backpage.com*, 104 F. Supp. 3d at 152.

72. *Backpage.com*, 104 F. Supp. 3d at 156.

73. *Id.*

74. *See* 47 U.S.C. § 230(f)(3) (2012); *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wash. 2d 95, 103 (Wash. 2015).

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